IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5922 of 2004

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANISH N MODI DY. SECTION OFFICER

Versus

STATE OF GUJARAT

Appearance:

MR DG CHAUHAN for Petitioner No. 1

MR KP RAWAL, AGP, for Respondent No. 1

RULE SERVED for Respondent No. 1-3

MR LR PUJARI for Respondent No. 2

MR HS MUNSHAW for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 03/09/2004

ORAL JUDGEMENT

1.0 By way of the petition the petitioner has prayed for a direction to quash and set aside the Notification dated 9.4.2004 issued by the respondent no.2

recommending/selecting the name of respondent no.3 as successful candidate in the Special Competitive Examination held for the purpose of promotion to the post of Section Officer considering the seniority on the basis of date of birth, and further direct to include the name of the petitioner in the recommendation/selection list of successful candidates for promotion to the post of Section Officer on the basis of merit-cum-seniority.

2.0 The short facts as emerging from the record of the petition are as under:

3.0 The petitioner, who is M.Com, LL.B., is working as Deputy Section Officer. He was appointed as Assistant on 5.7.1997 whereas the respondent no.3 was appointed on 9.3.1998. A seniority list of Deputy section officer was published on 30.11.2000, wherein the name of the petitioner is at serial number 2647, whereas the name of respondent no.3 is at serial number 2776. Therefore according to the seniority list the petitioner is senior to respondent no.3 in the service. The criteria for promotion from the post of Deputy Section Officer to the post of Section Officer is proved merit and efficiency on seniority-cum-merit basis. According to the petitioner, the seniority is to be reckoned with from the date of appointment in service and not on the basis of date of birth.

3.1 In special competitive written and oral examinations held by the respondent no.2 for the purpose of promotion to the post of Section Officer, the petitioner and the respondent no.3 have obtained equal marks i.e.265. The respondent no.2 prepared the list of successful candidates wherein the name of the petitioner has been excluded on the ground that the petitioner is junior to respondent no.3 in Age group whereas the name of the respondent no.3 has been included in the selection list only by considering the seniority on the basis of his date of birth i.e. age. Therefore, the petitioner alleged that the respondent no.2 wrongly included the name of respondent no.3 in the selection list for promotion to the post of Section Officer.

3.2 The petitioner made representation to ventilate his grievances to the Public Service Commission as well as to the respondents State Government, but the same was not responded to. Since nothing was turned out he has approached this Court by way of this petition.

4.0 While admitting this petition this Court has restrained the respondent from giving promotion to

respondent no.3 and thereafter the ad interim relief was confirmed till final disposal of the petition.

5.0 Mr.Chauhan for the petitioner contended that in the present case there is a breach of Rule 7 of the Section Officer (Class-II Secretariat Service) Recruitment Rules, 1983 (the Rules for short) as the respondent no.2 did not determine any qualifying standard for passing examination for the purpose of promotion as Section Officer. He further contended that the respondent no.2 has committed a mistake in recommending 20 persons for appointment to the post of Section Officer on the basis of Marks obtained in the Competitive Examination and considering the seniority on the basis of date of birth. It is the contention of the petitioner that the respondent no.2 has disregarded the seniority of the petitioner and other successful candidates and included the name of respondent no.3 in the selection list considering the seniority on the basis of date of birth even though the rules provide for "proved merit and efficiency on seniority-cum merit basis". He further contended that the petitioner is senior to respondent no.3, but his name has not been included in the Selection List erroneously. He submitted that since this is a question of promotion, the seniority is to be considered and not the date of birth.

6.0 The respondents have appeared and have filed their replies.

7.0 Learned Advocate for the respondent no.1 has contended that the appointment to the post of Section Officer is made by direct selection or promotion or by special selection from employees working as Assistants (Deputy Section Officers) as per the criteria laid down in the rules.

7.1 He submitted that Section Officer, Gujarat Secretariat Service, Class II (Special Competitive Examination) Rules govern the special selection from amongst the persons working as Assistant. This examination is being conducted by GPSC. As set out in the Rules, under Rule 7 of the said Notification, the qualifying standard for passing the examination shall be determined by the Commission from time to time and the power to publish the result will solely be rest with the GPSC.

7.2 As per the rule 11 of the said Notification, promotion and post of the successful candidates, will be made by the State Government in G.A.D., out of the

persons whose names have been shown as successful candidates in the result published under Rule of the said Notification. However, the persons should be appointed in the order of merit as otherwise eligible to be promoted under the said rules and post them as Section Officers in the Departments of Secretary as per further requirement. Learned counsel submitted that the qualifying standard and selection procedure is being maintained by the GPSC and that according to the statutory Rules the recommendation and inclusion of the names is being done by the GPSC.

7.4 The promotion to the post of Section officer by special selection is on the basis of Special (GSS) Competitive Exam held by the GPSC and as per Rule 11 of Special (GSS) Competitive Exam Rules, 1983, the Government promotes as Section Officer such persons in the order of merit as are otherwise eligible to be promoted under the said Rules. Thus this being the competitive exam, the appointment is regulated by the sole criteria of merit.

7.5 Learned counsel submitted that this being a special promotion method, it is not necessary to publish the number of posts to be filled in as section officer. In the present case the selection/recommendation list was prepared by the GPSC as per the criteria laid down by it for qualifying standard and selection of candidates, which is purely under its purview and therefore the State Government has no role to perform in the matter of preparing selection/recommendation list.

8.0 Mr. Pujari on behalf of the GPSC submitted that on receiving the requisition for selection and recommendation of the names of candidates for 20 posts, a Special Competitive Examination was held by the respondent no.2 in the month of December 2003 and thereafter an oral interview of successful candidates was held in the month of April 2004. After holding the Special Competitive Examination, a merit list was prepared by the respondent no.2.

8.1 In the said list names of 20 candidates were included. As per the consistent and long standing practice adopted by the Commission in all the competitive examinations held by it, when two or more persons obtain equal marks, the name of the candidate for selection was included in the list on the basis of date of birth.

8.2 He submitted that this method was adopted in the year 1979. He submitted that in October 1988 the

Commission made inquiries and collected information with regard to the method adopted by all Public Service Commissions of the country and in response thereto the Commission has received reply from the Commissions of States like Andhra Pradesh, Kerala, Tamilnadu, West Bengal, U.P., Rajasthan, Nagaland, Maharashtra, Tripura, Nepal and also State Selection Commission of Delhi. Accordingly in the year 1988 a policy decision was taken by the Commission to continue this method and the same has been adopted by the Commission in all the competitive examinations held by it. According to him this practice is also adopted by other Public Service Commissions. He further submitted that a proper reading of Rule 2 (a), (b) and (c) of the Recruitment Rules makes it very clear that the appointment under Rule 2(c) is to be made not on seniority-cum-merit basis but by selection and also the ratio of 3:15:2 is to be maintained while making the appointments.

9.0 The factual position which is undisputed is that the petitioner was appointed on 5.7.1997 as Assistant (redesignated as Deputy Section officer) whereas the respondent no.3 was appointed on 9.3.1998. In the seniority list of Deputy Section Officer, the name of the petitioner is at serial no.2647, whereas the name of respondent no.3 is at serial no.2776. Therefore, admittedly the respondent no.3 is junior to the petitioner. The petitioner and the respondent no.3 along with others had appeared in the special competitive examination held by the Gujarat Public Service Commission. The petitioner and the respondent no.3 obtained 265 marks each. Therefore the question was whether the name of petitioner or respondent no.3 is to be considered for promotion. Thereupon the respondents on the basis of date of birth decided to promote the respondent no.3 ignoring the fact that the petitioner is senior to him.

10.0 In this context the relevant rules are required to be taken into consideration. Rule 2 of the Rules deals with the appointment to the post of Section Officer which reads as under:

2. Appointment to the post of Section Officer shall be made either:

[a] by direct selection on the basis of the result of the competitive examination held by the Gujarat Public Service Commission; or

[b] by promotion to a person of proved merit

and efficiency on seniority-cum merit basis from amongst the persons working as Assistant in the Upper Division of the Subordinate Secretariat Service who have passed the Departmental Examination prescribed for the purpose of promotion to the post of Section Officer, irrespective of the fact whether such persons fall or do not fall under clause (c); or

[c] by special selection from amongst the persons working as Assistants, who are graduates and have completed at least five years' regular continuous service and have passed the Special Competitive Examination held by the Gujarat Public Service Commission in accordance with the rules prescribed by the State Government in that behalf, from time to time and also have passed the Departmental Examination meant for the purpose of promotion as Section officer:

Provided that the Assistants, who complete five years' regular continuous service on the last day of the month immediately preceding the month in which the special competitive Examination for promotion as Section officer is held shall be eligible to appear in the said examination."

Rule 11 of the Rules reads as under:

"11. Promotion and posting of successful candidates: Out of the persons whose names have been shown as successful candidates in the result, published under rule 8, Government shall promote as Section officer such persons in the order of merit as are otherwise eligible to be promoted under the said rules as Section Officer and post them in different Departments of the Secretariat according to the requirement."

10.1 A combined reading of both the rules it is clear that the post in question is to be filled in by way of promotion. The mode of conduct is special selection from amongst the employees working as Assistant who are graduate and who have completed five years regular continuous service and have passed the special competitive examination held by the GPSC.

10.2 In the present case the petitioner as well as respondent no.3 have passed the competitive examination and therefore they both are qualified. However, both of them have obtained equal mark and therefore the question

was as to who should be promoted to the post of Section Officer. The respondent authorities applied the date of birth and promoted the respondent no.3. The question therefore is whether the respondent authorities were right in relying upon the date of birth for giving promotion to the respondent no.3. In this context I am of the opinion that in the case of promotion the seniority is to be considered and not their date of birth, otherwise it would create an anomally in the cadre.

10.3 In support of his contention Mr. Chauhan has relied upon a decision of the Supreme Court in the case of Avtar Singh Sekhon Vs. Union of India and others, reported in 1980(Supp) SCC 562. Para 4 of the said decision reads as under:

> "4. Three factors need more than passing notice. The Defence Ministry - the file had been shown to us at the hearing of the appeal and there is material in the pleading also - has been considering revision of the 1964 policy and the court has upheld its full freedom to do so. Secondly, the post of Brigadier fell vacant in 1979 and,on the direction of the High Court, an evaluation of the claims of both was made by the Selection Panel on an updated basis. In this process, both were adjudged equal and the senior (the respondent in the review petition) was recommended for appointment. Thus, it is obvious that had the Defence Ministry been permitted to choose, the respondent would have enjoyed the post. There is nothing outrageous in picking the senior when both are otherwise equal. There is a human side to it also. The senior was to retire in few months and the other hopefully would have his innings."

10.4 Thus, as per the aforesaid decision among persons of equal merit, promotion given to the seniormost person is justified.

10.5 Mr. Chauhan has also relied upon a decision of the Supreme Court in the case of V. Sreenivasa Reddy and others Vs. Govt. of A.P. and others, reported in 1995 Supp(1) SCC 572 wherein it is held that seniority used to be given on the basis of appointment in accordance with the rules and in the present case the Rule says "promotion". Therefore seniority is required to be considered.

10.6 Mr. Chauhan next relied upon a decision in the case of Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra and others, reported in (1990)2 SCC 715, wherein it is held that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

10.7 Mr. Chauhan has relied upon a decision in the case of Karnataka Vs. C. Dinakar, reported in 1999(3) SCALE 66, wherein the Supreme Court quoted para 9 of the order of the High Court and dismissed the appeal. The relevant part of said quotation in para 9 as applicable to the present case reads as under:

> "9. ...Both the claimants were, therefore, having similar ACRs with three "outstandings" and two "very good". There was nothing on record to show that Respondent no.4 was in any way better adjudged than the Petitioner. It is not the case of the respondents that any other record of the claimants was taken into account while making the appointment by selection. Merit being equal between the rival claimants, the seniority of the Petitioner could not have been ignored by Respondent no.2." (emphasis supplied)

10.7.1 Thus, it is clear that in case of promotion, seniority is to be given priority if otherwise both are equal.

10.8 In view of the above, Mr. Chauhan contended that for promotion the seniority is required to be considered and the date of birth is to be considered only at the initial appointment.

11.0 As stated above, a combined reading of the rules it is clear that the post in question is to be filled in by promotion and if it is promotion then the date of birth cannot be considered for the purpose of selection. For promotion the date of entry in the service is required to be considered.

12.0 On behalf of Gujarat Public Service Commission has contended that it is a long standing practice and it is after consulting all other public service commissions the criterion of considering the date of birth is taken. Mr. Pujari, therefore, submitted that the long standing practice may not be disturbed. In this context Mr. Pujari has relied upon a decision of the Supreme Court in

the case of N. Sureshnathan and Another Vs. Union of India and others, reported in 1992 Supp(1) SCC 584. In that decision it is held that if the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined. However, in that case the promotion was to the post of Assistant Engineer in PWD and the criterion was possessing degree in Civil Engineering with three years' service in the grade eligible under rules. The question was only with regard to counting of period in respect of possessing degree in Civil Engineering. It was in consonance with the rules. In the present case the facts are entirely different inasmuch as the petitioner and the respondent no.3 got equal marks and petitioner is admittedly senior to respondent no.3. Therefore the aforesaid decision would be of no help to the respondents.

12.1 Mr. Pujari has also relied upon a decision of the Supreme Court in the case of Bimlesh Tanwar Vs. State of Haryana and others, reported in (2003)5 SCC 604 wherein it is held that despite absence of any specific rule relating to determination of inter se seniority, a long standing practice prevailing in the High Court has been that it be determined strictly on the basis of the order of merit. In the present case the criterion for promotion from the post of Deputy Section Officer to the post of Section Officer is "proved merit and efficiency on seniority-cum-merit basis" and therefore the respondent cannot take the shelter of "long standing practice".

12.2 Mr. Pujari has also relied upon a decision of the Supreme Court in the case of Secy. (Health) Deptt. Of Health & F.W. and Another Vs. Dr.Anita Puri and others, reported in (1996)6 SCC 282 wherein it is held that in absence of a statutory rule or guideline issued by the Government for the purpose of valuation of merit of the candidates when the Public Service Commission is required to select some candidates out of a number of applicants for certain posts the sole authority and discretion is vested with the Commission. In this connection it is pertinent to note that on the facts of the case there are rules for selection and promotion should also be on the basis of proved merit and seniority.

13.0 On the facts of the case the post in question is required to be filled in by special examination from amongst the employees and all throughout under the Rules

the word is "Promotion" and therefore in service jurisprudence whenever there is a question of promotion comes, the relevant date of entry in service should be taken into consideration. In such circumstances, if all other things are equal, in my opinion, and if date of birth is taken as the criterion for promotion, prejudice would be caused to the senior who has admittedly put in more service than his junior. The senior will retire earlier and in most of the cases the juniors will have further opportunities, whereas if on the basis of date of birth the senior is pushed down, he may lose his chance of promotion for ever. Where appointment is made in accordance with rules, seniority should be counted for the purpose of promotion. Learned counsel for the respondents has failed to point out any provision for taking the date of birth for the purpose of giving promotion to a person when a senior person having equal merits is available. Rile 2 clearly stipulates for "proved merit and efficiency on seniority-cum-merit basis". Under the circumstances the present petition requires to be allowed.

14.0 In the premises aforesaid, the petition is allowed. The Notification dated 9.4.2004 issued by the respondent no.2 recommending/selecting the name of respondent no.3 as successful candidate in the Special Competitive Examination held for the purpose of promotion to the post of Section Officer is hereby quashed and set aside qua respondent no.3. The respondent authority is directed to consider the case of the petitioner for the promotion to the post of Section Officer on the basis of merit-cum-seniority and to include his name in the recommendation/selection list of successful candidates for promotion to the post of Section Officer. Rule is made absolute accordingly with no order as to costs.

[K.S. JHAVERI, J.]
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